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DEAN ANDAL and DONALD WOLFE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

ANNA JORDAN, et al.,

Plaintiffs/Petitioners,

vs.

CALIFORNIA DEPARTMENT OF
MOTOR VEHICLES, et al.,

Defendants/Respondents.

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

ARBITRATION PANEL In the Matter
of the Binding Arbitration Between
Anna Jordan, et al. and State of
California, et al.,

Respondent.

AND

Case No. 95AS05228
Assigned to: Hon. Joe S. Gray

**NOTICE OF MOTION AND
MOTION TO CONSOLIDATE
ACTIONS FOR TRIAL;
MEMORANDUM OF POINTS AND
AUTHORITIES; AND
DECLARATION OF ERIC S.
NORBY**

[CCP §1048(a)]

DATE: March 14, 2001
TIME: 9:00 a.m.
DEPT: 54

Case No. 01CS00073
Assigned to: Hon. Joe S. Gray

ANNA JORDAN; ELISE RAMOS;
MARK GLICKMAN; MICHAEL
FOLEY; MILBERG, WEISS,
BERSHAD, HYNES & LERACH, LLP;
WEISS & YOURMAN;
BLUMENTHAL, OSTROFF &
MARKHAM; SULLIVAN, HILL, REZ
& ENGEL; and LAW OFFICES OF
RICHARD M. PEARL,

Real Parties-In-Interest and
Respondents.

DEAN ANDAL, an individual;
DONALD WOLFE, an individual,

Plaintiffs and Petitioners,

v.

KATHLEEN CONNELL, in her official
capacity as California State Controller;
B. TIMOTHY GAGE, in his official
capacity as Director, California State
Department of Finance; MILBERG
WEISS BERSHAD HYNES &
LERACH LLP, a limited liability
partnership; WEISS & YOURMAN, a
partnership; BLUMENTHAL,
OSTROFF & MARKHAM, a
partnership; SULLIVAN HILL LEWIN
REZ & ENGEL, a professional law
corporation; RICHARD M. PEARL, an
individual,

Defendants and Respondents.

Case No. 01CS00076
Assigned to: Hon. Joe S. Gray

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 14, 2001, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department 54 of this Court, located at 800 Ninth Street, Sacramento, California, plaintiffs in Case No. 01CS00076, DEAN ANDAL and DONALD WOLFE, will, and hereby do move under Code of Civil Procedure section 1048(a) for an order consolidating Case No. 01CS00076 with Case No. 01CS00073 and with Case No. 95AS05228 for the purpose of trying the common questions of law and fact relating to an arbitration award for \$88,479,713 which is at issue in these three actions.

The motion will be made pursuant to Code of Civil Procedure section 1048(a) on the grounds that these actions involve common questions of law, and that the controversy in the three actions is whether said arbitration award is valid and can be enforced against the State of California. Consolidation of these three actions for trial will avoid unnecessary costs and delay and will avoid inconsistent rulings of law.

The motion will be based on this notice of motion, the declaration of Eric S. Norby, the memorandum of points and authorities served and filed herewith, the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: February 16, 2000

By: ERIC S. NORBY
Attorney for Plaintiffs and Petitioners
DEAN ANDAL and DONALD WOLFE

MEMORANDUM OF POINTS AND AUTHORITIES

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I. INTRODUCTION.

The issue to be determined by this Court in this motion is whether three actions should be consolidated for the trial of common questions of law pursuant to Code of Civil Procedure section 1048(a). The three actions are *Jordan et al. v. Department of Motor Vehicles et al.* (“*Jordan*”), Sacramento County Superior Court, Case No. 95AS05228, *State of California et al. v. Arbitration Panel et al.* (“*State of California*”), Sacramento Superior Court, Case No. 01CS00073, and *Andal et al. v. Connell et al.* (“*Andal*”), Sacramento County Superior Court, Case No. 01CS00076. The moving parties are the plaintiffs and petitioners in *Andal* and contend that the consolidation of these actions for trial is appropriate.

The ultimate question to be decided in each of these actions is the same. Is a certain arbitration award of \$88,479,713 for attorneys fees and expenses in *Jordan* (“the arbitration award”) valid and enforceable against the State of California? The arbitration award was made pursuant to the last sentence of Revenue and Taxation Code section 6909(b).

The moving parties contend that the consolidation of these three actions to try this ultimate question and related subsidiary questions will save this Court’s time and will avoid conflicting rulings on common questions of law. They ask this Court to grant their motion to consolidate these actions for purposes of trial.

II. FACTS.

A. *Jordan v. Department of Motor Vehicles.*

Jordan involves a petition to confirm the arbitration award by amending the final judgment in *Jordan* to increase the attorneys fees and expenses awarded by this Court in that judgment from \$18,194,319.92 to \$88,479,713.

Jordan is an action brought by certain plaintiffs (“*Jordan* plaintiffs”) against the California Department of Motor Vehicles (“DMV”), the State Board of Equalization (“BOE”) and the State of California (“the State”) for the refund of smog impact fees paid

by them to the DMV. The *Jordan* plaintiffs contended that the smog impact fee was unconstitutional. This Court agreed and entered a judgment in favor of the *Jordan* plaintiffs.

This judgment was affirmed in part and reversed in part by the Third District Court of Appeal in *Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449.

After this Court's judgment, but before the Court of Appeal opinion, the *Jordan* plaintiffs moved for attorneys fees and expenses for their attorneys ("*Jordan* attorneys"). This Court granted the motion and awarded the *Jordan* attorneys \$18,194,319.92. The DMV, the BOE and the State appealed this Court's attorneys' fees order. The *Jordan* plaintiffs did not appeal the attorneys' fees order.

Before the appeal of the attorneys' fees order was decided, the Legislature enacted Chapter 32 of the 2000 California Statutes ("Chapter 32"). Chapter 32 added section 6909 to the Revenue and Taxation Code. By the enactment of section 6909, the Legislature appropriated \$665,261,000 from the California State Treasury to refund smog impact fees to the people who had paid the fee since its imposition in 1990.

The last sentence of Revenue and Taxation Code section 6909(b) provides that the "appropriate level of court costs, fees, and expenses in the settlement" of *Jordan* "shall be determined through binding arbitration and all of those fees, costs, or expenses shall be paid with funds from the [Smog Fee Refund Account]" (the "last sentence of section 6909(b)").

After the enactment of Chapter 32, a Deputy Attorney General signed a document entitled "Agreement to Arbitrate Amount of Attorney Fees" and the DMV, the BOE and the State dismissed their appeal of the \$18,194,319.92 attorneys' fees order.

After the dismissal of the appeal of the attorneys' fees order, three arbitrators held a hearing and pursuant to the last sentence of section 6909(b) awarded the *Jordan* attorneys \$88,479,713.

Thereafter, the *Jordan* attorneys filed a petition to confirm the arbitration award and amend the final judgment in *Jordan* to increase their attorneys' fees from \$18,194,319.92 to \$88,479,713. In their answer to this petition, the DMV, the BOE and the State contend that the arbitrators exceeded the power granted to them by the Legislature in the last sentence of section 6909(b) by awarding more than the \$18,194,319.92 that this Court awarded in *Jordan*. Further, they contend that this Court has no jurisdiction to amend the final judgment in *Jordan* and that the petition to confirm the arbitration award is barred by res judicata. A hearing on this petition is set for March 14, 2001 in this Court.

B. *State of California v. Arbitration Panel.*

State of California is an action filed by the DMV, the BOE and the State against the arbitrators, the *Jordan* plaintiffs and the *Jordan* attorneys. In this action the *State of California* petitioners ask this Court to vacate the \$88,479,713 arbitration award for attorneys' fees or in the alternative to order the arbitrators to modify the arbitration award to comply with the last sentence of section 6909(b). They contend that the arbitration award violates the last sentence of section 6909(b) because it exceeds the amount of the \$18,194,319.92 attorneys' fee order made by this court in *Jordan*.

In their answer to the *State of California* petitioners, the *Jordan* attorneys contend that the last sentence of section 6909(b) granted the arbitrators the power to award them any amount of attorneys' fees without regard to the amount awarded by this Court.

C. *Andal v. Connell.*

Andal is an action for declaratory relief, injunctive relief and a petition for writ of mandate brought by two California taxpayers, who are also public officers in California, against the California State Controller ("State Controller"), the Director of the California State Department of Finance ("Director of Finance") and the *Jordan* attorneys.

The *Andal* plaintiffs ask this Court to declare that the last sentence of

section 6909(b) violates various sections of the California Constitution, and that the \$88,479,713 arbitration award which was made pursuant to this sentence is therefore void. The *Andal* plaintiffs will further ask this Court to declare that the arbitration award is unenforceable because this Court is without jurisdiction to amend the final judgment in *Jordan*, and because any other action to confirm the arbitration award would be barred by either res judicata, direct estoppel or collateral estoppel.

Because the arbitration award is void and unenforceable, the *Andal* plaintiffs ask the court for an injunction and a writ of mandate prohibiting the State Controller and the Director of Finance from paying the \$88,479,713 to the *Jordan* attorneys.

**III. THIS COURT HAS DISCRETION TO CONSOLIDATE *JORDAN*,
STATE OF CALIFORNIA, AND *ANDAL* FOR THE TRIAL OF
COMMON QUESTIONS OF LAW.**

Code of Civil Procedure section 1048(a) provides that “[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial for any or all matters in the actions;” or “it may order all the actions consolidated . . .”

“Consolidation may be for all purposes, or for purpose of trial only: . . .” (*Stubblefield v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 701.) If actions are consolidated for all purposes, the pleadings in the actions are merged and the actions are determined by a single judgment; if the actions are consolidated only for trial of related issues, separate findings and judgments are made in each action. (*Id.* at p. 701.)

It would be inappropriate to consolidate the three actions at bar for all purposes because there already is a final judgment in *Jordan*, and the moving parties ask this Court to consolidate these actions only for the purpose of trying the common questions of law.

“The discretion of the trial judge, either in granting or denying [consolidation], is almost invariably upheld.” (4 Witkin, Cal. Proc. (4th ed. 1997) Pleading §309, p. 402.)

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**IV. THERE ARE FOUR COMMON QUESTIONS OF LAW IN *JORDAN*,
STATE OF CALIFORNIA, AND *ANDAL*.**

**A. Does this Court have jurisdiction to amend the final judgment in
Jordan to increase the attorneys' fees award from \$18,194,319.92 to
\$88,479,713?**

The *Jordan* attorneys contend, in their petition to confirm the arbitration award and amend the final judgment, that this Court has jurisdiction to amend its final judgment in *Jordan* to increase the amount of the award of attorneys' fees and expenses in that judgment from \$18,194,319.92 to \$88,479,713. The *Andal* plaintiffs, the DMV, the BOE and the State contend that this court has no jurisdiction to amend the final judgment in *Jordan*. Therefore, this Court cannot increase the \$18,194,319.92 attorneys' fees award in that judgment. (See *Rochin v. Pat Johnson Mfg. Co.* (1998) 67 Cal.App.4th 1228, 1237 [a court is without jurisdiction to amend a judgment after the time for direct attack on the judgment has expired].)

**B. Is the entry of a new judgment to confirm the arbitration award
barred by either res judicata, direct estoppel or collateral?**

The *Andal* plaintiffs, the DMV, the BOE and the State contend that the arbitration award cannot be confirmed by a new judgment because any action to confirm it would be barred by res judicata. The *Andal* plaintiffs further contend that if the entry of a new judgment confirming the arbitration award is not barred by res judicata it would be barred by either direct estoppel or collateral estoppel. The issue of the award of attorneys' fees in *Jordan* has already been litigated and decided by this Court and any action that the *Jordan* attorneys bring to confirm the arbitration award will be barred by

the final judgment in *Jordan*.

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C. Did the Legislature, by enacting the last sentence of section 6909(b), grant the arbitrators the power to make an arbitration award which exceeded the \$18,194,319.92 awarded by this Court in *Jordan* final judgment?

The *Jordan* attorneys contend that Revenue and Taxation Code section 6909(b) granted to the arbitrators the power to award them any amount of fees that the arbitrators deemed appropriate. Therefore, they contend that the arbitrators had the power to award them any amount of money, including \$88,479,713, for their work in *Jordan*.

The DMV, the BOE and the State contend that the last sentence of section 6909(b) limits the amount of fees and costs that the arbitrators have the power to award to the *Jordan* attorneys to the \$18,194,319.92 awarded in *Jordan*. Therefore, they contend that the \$88,479,713 award is void because it is in excess of the arbitrators power granted to them by the final sentence of section 6909(b).

The *Andal* plaintiffs contend that the last sentence of section 6909(b) violates the California Constitution, and therefore, the Legislature granted no power to the arbitrators to make any award of attorneys' fees.

D. Does the last sentence of section 6909(b) violate the California Constitution?

The *Andal* plaintiffs contend that the last sentence of section 6909(b) violates various sections of the California Constitution and that the \$88,479,713 arbitration award made pursuant to this sentence is void. The DMV, the BOE and the State contend that the payment by the State of California of any amount in excess of the

\$18,194,319.92 awarded by this Court in *Jordan* would be a gift of public money and violate the California Constitution. (Cal. Const. Art. XVI, sec. 6.)

The *Andal* plaintiffs contend that the final sentence of section 6909(b) violates the following provisions of the California Constitution:

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- Article III, section 3, Article IV, section 1 and Article XVI, section 7, because it delegates to arbitrators the power to make law and appropriate money from the California State Treasury;
- Article XVI, section 6, because it authorizes arbitrators to make a gift of money from the California State Treasury;
- Article IV, section 16(b), because it is an invalid special statute which grants the *Jordan* attorneys the privilege of avoiding the certain general statutes; and
- Article IV, section 9, because Chapter 32 embraces two subjects, one of which - the delegation of unlimited legislative power to arbitrators to award attorneys' fees - is not expressed in the title of the Chapter.

V. **CONCLUSION**

In order to avoid the duplication of court hearings involving the same questions of law and to avoid conflicting rulings of law, the moving parties ask this Court to order a joint trial on the *Jordan* attorneys' petition to confirm the arbitration award, the DMV/BOE/State petition to vacate the arbitration award, and the Andal plaintiffs' complaint for declaratory relief, injunctive relief and petition for writ of mandate.

Dated: February 16, 2000

By:

ERIC S. NORBY
Attorney for Plaintiffs and Petitioners
DEAN ANDAL and DONALD WOLFE

DECLARATION OF ERIC S. NORBY

I, Eric S. Norby, declare:

1. I am the attorney of record for the moving parties, Dean Andal and Donald Wolfe, in this motion. The moving parties are plaintiffs and petitioners in Case No. 01CS00076, entitled *Andal et al v. Connell et al*, now pending before this Court.

2. The three actions that the moving parties ask this Court to consolidate for the trial of a common question are:

- *Jordan, et al. v. Department of Motor Vehicles, et al.*, Sacramento County Superior Court, Case No. 95AS05228;
- *State of California, et al. v. Arbitration Panel, et al.*, Sacramento County Superior Court, Case No. 01CS00073;
- *Andal et al. v. Connell, et al.*, Sacramento County Superior Court, Case No. 01CS00076.

3. This is the common question in these three actions: Is an \$88,479,713 arbitration award for attorneys' fees and expenses, made pursuant to the last sentence of Revenue and Taxation Code section 6909(b), valid and enforceable against the State of California?

4. Consolidation of these three actions for the trial of this common question would avoid duplication of this Court's efforts and would avoid conflicting legal rulings by this Court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 16th day of February, 2001.

ERIC S. NORBY